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Janis Lynn Kile

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MANAGEMENT OF COMMUNITY ASSETS: INCORPOREAL MOVABLES

The management of community assets which are incorporeal movables¹ is an area that was not always contemplated in the revision² of the matrimonial regimes articles. Other than the provisions relating to registered movables, the Louisiana Civil Code has no special structure for the management of incorporeal movables; thus, the general rules for management of community property apply. But applying the general rules can create special problems because these rules really are concerned more with immovable than with movable property. Additionally, with some incorporeal movables, just determining which general rule applies often is a difficult task. Nevertheless, incorporeal movables are important community assets whose management deserves careful consideration.

General Management Provisions

The Civil Code articles regulating management of community property apply to the management of all property, including incorporeal movables. In Louisiana community property is subject either to equal management, which is the general rule, or to one of the exceptions, which are joint and exclusive management. "Equal management," the general provision for management of community property,³ is expressed in Civil Code article 2346: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law."⁴ A community asset is governed by

1. LA. CIV. CODE art. 473 defines incorporeal movables as "[r]ights, obligations, and actions that apply to a movable thing" See also LA. CIV. CODE arts. 461 & 475. Before the new matrimonial regimes articles went into effect, the wife had no management powers over community assets which were incorporeal movables. LA. CIV. CODE arts. 2334 & 2404 (as they appeared prior to their repeal by 1979 La. Acts, No. 709). For the purpose of this paper, the assets discussed are considered community property, rather than the separate property of either spouse. See Note, *Classification of Incorporeal Movables*, 42 LA. L. REV. 744 (1982).

2. See LA. CIV. CODE, Book III, Title VI, § 2, arts. 2346-2355 (management of community property). These articles were added by 1979 La. Acts, No. 709, § 1. The 1979 revision is similar to the 1978 revision. 1978 La. Acts, No. 627, § 1 (repealed 1979).

3. LA. CIV. CODE art. 2346, comment (a). "The . . . comments in this Act are not intended to be considered as part of the law and are not enacted into law by virtue of their inclusion in this Act." 1979 La. Acts, No. 709, § 7. Cf. 1978 La. Acts, No. 627, § 10 (repealed 1979) ("The source, notes, comments, and special notes contained in this chapter reflect the intent of the legislature.").

4. LA. CIV. CODE art. 2346.

equal management unless it is included in one of the exceptions to equal management.⁵ The most common items of community property subject to equal management include: movables registered in the names of both spouses in the alternative ("Mr. or Mrs."),⁶ unregistered movables (including money),⁷ the portions of personal injury claims which are community property,⁸ contractual rights,⁹ furniture or furnishings not located in the family home,¹⁰ donations to a third party of customary gifts,¹¹ and the movable assets of community enterprises when both spouses participate in the management of the business.¹²

The two exceptions to equal management are "joint" or "concurrent" management¹³ and "exclusive" or "sole" management.¹⁴ Joint management requires the concurrence of both spouses for the "alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly ["Mr. and Mrs."]."¹⁵ A donation of community property to a third party also requires concurrence unless the donation is a "usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation."¹⁶ Under exclusive management only one particular spouse has the authority to manage certain community assets.¹⁷ Exclusive management applies to a movable issued or registered as provided by law in the name of only one spouse,¹⁸ to the community enterprise if one spouse is the "sole

5. These exceptions are found in articles 2347-2352 and 2355. See LA. CIV. CODE art. 2346, comment (a). *But see* Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation*, 53 TUL. L. REV. 105, 109 (1978): Assets included under equal management are "already few as a matter of law, [and] will prove to be fewer yet in practice."

6. See LA. CIV. CODE arts. 2346, 2347, & 2351.

7. See LA. CIV. CODE art. 2351.

8. LA. CIV. CODE art. 2344.

9. See LA. CIV. CODE art. 2346, comment (b), and text at notes 35-62, *infra*.

10. See LA. CIV. CODE art. 2347. See also Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 118 (1979).

11. LA. CIV. CODE art. 2349.

12. LA. CIV. CODE art. 2350, comment (b). See text at notes 15 & 19-21, *infra*.

13. LA. CIV. CODE arts. 2347 & 2349.

14. LA. CIV. CODE arts. 2348 & 2350-2352.

15. LA. CIV. CODE art. 2347. The comments state that encumbrances imposed by law (vendor's privilege, mechanic's or materialman's lien, or judicial mortgage) are not subject to joint management. LA. CIV. CODE art. 2347, comment (a).

16. LA. CIV. CODE art. 2349.

17. See LA. CIV. CODE arts. 2348 & 2350-2352.

18. "A spouse has the exclusive right to manage, alienate, encumber, or lease movables issued or registered in his name as provided by law." LA. CIV. CODE art. 2351.

manager,"¹⁹ and to a partnership interest.²⁰ If one spouse expressly renounces the right to concur "in the alienation, encumbrance, or lease of a community immovable or some or all of the community immovables, or all or substantially all of a community enterprise," the other spouse will have exclusive control in that area.²¹ A spouse may also "renounce the right to participate in the management of a community enterprise."²² Two additional ways to avoid the concurrence requirement are by a marriage contract²³ or express mandate.²⁴ In rare instances exclusive management rights also might be authorized by a court.²⁵

Because the equal and exclusive management provisions may allow the managing spouse to manage the entire community mass, including the one-half interest owned by the other spouse,²⁶ limitations are imposed on the actions of this managing spouse. One limitation is that when a spouse manages the entire community mass, he does not obligate the separate property of the other spouse.²⁷ Instead, the spouse who incurs a debt obligates the community property and his separate property only. The comments describe this system of management as being "neither a tacit mandate granted by the other spouse nor authority deriving from coownership."²⁸ Instead "[i]t is an attribute of any regime of community property, established by provisions of law."²⁹

Before the revision of the matrimonial regimes articles, the husband, as "head and master" of the community, could manage the

19. "The spouse who is the sole manager of a community enterprise has the exclusive right to alienate, encumber, or lease its movables unless the movables are issued in the name of the other spouse or the concurrence of the other spouse is required by law." LA. CIV. CODE art. 2350.

20. "A spouse who is a partner has the exclusive right to manage, alienate, encumber, or lease the partnership interest." LA. CIV. CODE art. 2352.

21. LA. CIV. CODE art. 2348, as amended by 1981 La. Acts, No. 132, § 1. This renunciation may be "irrevocable for a stated term," unlike the contract of mandate, which is revocable. See LA. CIV. CODE arts. 3027-3028.

22. LA. CIV. CODE art. 2348.

23. LA. CIV. CODE arts. 2328-2333.

24. LA. CIV. CODE art. 2985.

25. LA. CIV. CODE art. 2355. See text at note 114, *infra*.

26. LA. CIV. CODE art. 2336, comment (d). Article 2336 states that "[e]ach spouse owns a present undivided one-half interest in the community property."

27. See LA. CIV. CODE art. 2345. This limitation is consistent with article 735 of the Louisiana Code of Civil Procedure. If one spouse is the "managing spouse," the proper defendant in an action to enforce an obligation against the community property is the spouse who managed the transaction involved.

28. LA. CIV. CODE art. 2336, comment (d).

29. LA. CIV. CODE art. 2336, comment (d).

community assets without his wife's consent.³⁰ By so managing he did not obligate his wife's separate property. Although the former articles did not give the wife the authority to bind the community or her husband without his consent, the courts recognized this power in some situations.³¹ For example, if the wife contracted with third parties for "necessaries" that the husband had not provided (although obligated to do so), the courts usually imposed liability upon the husband for these debts even though his consent was not secured.³² The courts formulated no clear doctrine to impose this liability on the husband's patrimony (which included his separate property and the community property), but the concepts of tacit mandate and *negotiorum gestio* were sometimes used as a basis for liability.³³ The wife thus was able to bind the separate property of the husband. Under the new articles, when a spouse is managing community property without the consent of the other spouse, this managing spouse does not obligate the separate property of the other spouse. However, in those situations when the separate concepts of *negotiorum gestio* or mandate apply, the managing spouse still will be able to bind the separate property of the other spouse.³⁴

The other limitation on the actions of the managing spouse arises from the concept of privity of contract. This limitation, referred to in a comment to article 2346, suggests that a spouse may not interfere with a contract entered into by the other spouse and a third party.³⁵ The comment seems to indicate that the legislature intended that conflicts between equal management and privity of contract should be resolved in favor of privity of contract. The resolution of this conflict is important because of its effect on the management of contractual rights.

Contractual rights are included in community property, for the community of acquets and gains is a "patrimonial mass, that is, a

30. LA. CIV. CODE art. 2404 (as it appeared prior to its repeal by 1979 La. Acts, No. 709).

31. Comment, *Liability of the Husband for Contractual Obligations of His Wife—Louisiana Legislation and Jurisprudence*, 30 LA. L. REV. 441, 460 (1970).

32. *Id.* See also LA. CIV. CODE arts. 119 & 120.

33. Comment, *supra* note 31, at 441. See LA. CIV. CODE art. 1787 (repealed 1979); LA. CIV. CODE arts. 2295-2300 & 2985-3034.

34. See LA. CIV. CODE arts. 2295-2300 & 2985-3034. Absent a clear showing that the managing spouse is the other spouse's representative, the managing spouse will not be able to bind the separate property of the other spouse. See LA. CIV. CODE art. 2345. See generally *Tricketts, Inc. v. Viser*, 137 So. 2d 424 (La. App. 2d Cir. 1962); *D.H. Holmes Co., Ltd. v. Huth*, 49 So. 2d 875 (La. App. Or. Cir. 1951); Comment, *supra* note 31, at 452-457.

35. LA. CIV. CODE art. 2346, comment (b).

universality of assets and liabilities."³⁶ Property in the matrimonial regimes articles thus means patrimony in the broadest sense, including contractual rights. The contractual right, however, is to be distinguished from the property which is acquired by the contract. This distinction is evident in the comment to article 2346:

A spouse acting alone may manage, control, and dispose of community property acquired by virtue of a contract made by the other spouse, unless this is property that the acquiring spouse has the exclusive right to manage or property that requires joint management. Nevertheless, he may not affect the legal relations and responsibilities of the spouse who incurred the obligation and the other party or parties to that contract, because, in principle, contracts produce effects as between the parties only.³⁷

If one spouse contracts on behalf of the community for the purchase of movable or immovable property, article 2346 seemingly would subject this contractual right to equal management, because contractual rights are not listed in any of the exceptions to equal management.³⁸ Equal management of the contractual right is consistent with the public policy the revision sought to achieve. Equal management encourages sharing in the decision-making process and participation by both spouses in the management of community property. However, equal management of a contractual right conflicts with the basic concept of privity of contract. If indeed the legislature did intend to adopt privity of contract, it effectively created another exception to equal management, an exception which is not contained in the articles regulating joint and exclusive management.³⁹

Although privity of contract is a common law phrase, the princi-

36. LA. CIV. CODE art. 2336, comment (c). See generally A. YIANNPOULOS, *PROPERTY* §§121-128 in 2 LOUISIANA CIVIL LAW TREATISE 315-335 (2d ed. 1980).

37. LA. CIV. CODE art. 2346, comment (b).

38. One might argue that contractual rights are "issued or registered as provided by law," thereby subjecting them to the provisions regulating registered movables. See text at notes 70-75, *supra*. Support for this argument is found in Civil Code articles 1779, 1780, 1889, and 1901, which imply that a contract must be in someone's name. However, this requirement is not "issuance" or "registration" in the technical sense. Also, if the legislature had intended that the provisions on registered movables should apply to contractual rights, then the comment to article 2346 should have referred to articles 2347 and 2351 rather than to general obligations principles. Further evidence that contractual rights are not regulated by the provisions on registered movables is that this interpretation ignores contracts for the purchase of immovables. Contracts for the purchase of immovables are not regulated by article 2347, and article 2351 does not regulate immovables.

39. See text at notes 13-25, *supra*.

ple is contained in Civil Code article 1780: "Those only are parties to a contract, who have given their consent to it, either expressly or by implication."⁴⁰ Privity is also expressed in article 1889: "No one can, by a contract in his own name, bind any one but himself or his representatives. . . ."⁴¹ Louisiana jurisprudence has held that "a third person not a party to a contract cannot sue for damages for its breach or to recover contractual benefits."⁴² These principles of privity of contract might apply to the management of community property, thereby requiring that only the spouse who is a party to the contract can cancel the contract, extend the time for performance, enforce the contract, or recover damages for its breach. The application of privity to the management of contractual rights is consistent with the policy interest of protecting third parties. Third parties should not be at the mercy of a spouse with whom they did not contract.

The application of these principles to the management of community property is seen in the following example. If the wife orders a car from a dealer, and the husband cancels the order, his action would affect the legal relation between the wife and the car dealer. The dealer should not abide by the husband's cancellation. If the dealer does comply with the husband's request, the wife can sue the dealer for breach of contract.⁴³ If, after the wife receives the car, payments are not made, the wife is the "proper defendant in an action to enforce the obligation."⁴⁴ If the equal management principle were applied, the husband could cancel the wife's contract and sue for performance or damages. Although the management articles apparently subject contractual rights to equal management, the principle of privity of contract should prevent the spouse who is not a party

40. LA. CIV. CODE art. 1780.

41. LA. CIV. CODE art. 1889. Article 1889 resembles French Civil Code article 1165: "Contracts only produce effect between the contracting parties: they do not harm third parties, and do not benefit them, except in the case specified in article 1121 [*stipulation pour autrui*]." FRENCH CIV. CODE art. 1165 (H. Cachard trans. 1930). This is similar to the Latin maxim: *Rex inter alios acta, aliis neque no cere neque prodesse potest*. "Third persons can neither suffer nor profit from a contract which was neither made by them nor for them." 2 M. PLANIOL, CIVIL LAW TREATISE pt. 1, no. 1172 (11th ed. La. St. L. Inst. trans. 1959).

42. *State ex rel. Guste v. Simoni, Heck & Associates*, 331 So. 2d 478, 483 (La. 1976): "The principle involved, however, merely expresses the Latin maxim: . . . [quoted in note 41, *supra*]." *Id.* at 483. See also *Crowley v. Hermitage Health & Life Ins. Co.*, 391 So. 2d 53, 55 (La. App. 3d Cir. 1980); *Holton v. Hubbard*, 49 La. Ann. 715, 731, 22 So. 338, 344 (1897).

43. See LA. CODE CIV. P. art. 686.

44. See LA. CODE CIV. P. art. 735. In this action, the husband would be a "necessary" party.

to the contract from affecting the legal relations and responsibilities of the contracting spouse.

If, in another example, both the husband and wife are freelance photographers, and the husband contracts with a third person to take pictures at a wedding, the wife cannot appear at the scheduled time and claim the right to take the pictures. The husband's obligation to take the pictures is personal; he has a legal duty to perform this obligation.⁴⁵ With contracts involving personal obligations, the argument is even stronger that privity of contract will prevent the non-contracting spouse from performing the personal obligation of the other spouse. Although the contractual right apparently is subject to equal management by the management articles,⁴⁶ since it does not fall into one of the recognized exceptions, the wife may not perform the obligation, for to do so would affect the legal relations and responsibilities of her husband. When the third person refuses to let the wife take the pictures, she will have no remedy against him.

Management of Incorporeal Movables

Community assets which are incorporeal movables are managed according to the framework provided in the management articles.⁴⁷ Incorporeal movables which are issued or registered in someone's name will be subject to either equal, joint, or exclusive management, depending on how the movable is registered. Nonregistered incorporeal movables are not included in either of the exceptions to equal management, so they are subject to equal management. Contractual rights and the community property portion of a spouse's personal injury claim are incorporeal movables which are not registered.

Contractual Rights

In addition to the contractual rights discussed in the previous section, other contractual rights that might form part of the community property are pledges, promissory notes payable to bearer, subscription rights, accounts receivable, interests in pension plans, and partnership interests. While partnership interests and community

45. See LA. CIV. CODE arts. 1997 & 2000.

46. See text at note 9, *supra*. The 1977 draft of the Quebec Civil Code regulates this problem by classification of the property. The pecuniary proceeds of any "creative work" are community property if they are collected during the community regime, but the "right to divulge the work, to fix the conditions of its exploitation and to defend its integrity remains private property." QUE. CIV. CODE 1977 Draft, Book II, arts. 90 & 131 (Service de traduction, Ministère des Communications trans. 1977).

47. See text at notes 3-25, *supra*.

enterprises are governed by specific provisions,⁴⁸ the other contractual rights are not subject to joint or exclusive management, so they will be governed by equal management. In each case, however, the spouse who did not incur the obligation should not be able to affect the legal relations and responsibilities of the spouse who did incur the obligation.

If magazine subscriptions, "book of the month" clubs, and offers to purchase season tickets are issued in the name of one spouse, these subscription rights arguably might be subject to the exclusive management of that spouse. However, because no provision of the law provides that the subscription right be "issued or registered" in someone's name (although it is customary to do so),⁴⁹ exclusive management under article 2351 does not apply. While the basic principle of equal management could be invoked to govern such agreements, since arguably these rights are not issued or registered in one name as provided by a law covering such rights, the principle of privity of contract ought to cover the situation to allow only the person who is a party to the contract to manage the rights under that contract.⁵⁰ Once the magazine and tickets have been received, however, they are things that form part of the community, and are subject to equal management.⁵¹

Another contractual right that the husband and wife might own is a partnership interest, as when one spouse is a partner with a third person. Article 2352 provides for exclusive management of the partnership interest by the spouse who is a partner.⁵² Without the exception contained in article 2352, the interest that one spouse has in a partnership might otherwise fall under the presumption of equal management.⁵³ The partnership *interest* is a right separate from the partnership *assets*; the latter will be managed according to the partnership agreement.⁵⁴

The contractual rights (and other assets) which are part of a business owned by the spouses will be managed according to the Civil Code articles governing "community enterprises."⁵⁵ The community enterprise articles apply only to businesses which are not legal entities. Thus, if the husband and wife form a corporation,

48. See LA. CIV. CODE arts. 2350 & 2352.

49. See text at notes 73-75, *infra*.

50. See text at notes 35-46, *supra*.

51. See text at notes 3-12, *supra*.

52. LA. CIV. CODE art. 2352. See note 20, *supra*.

53. LA. CIV. CODE art. 2352, comment. See text at notes 3-5 & 17-20, *supra*. Because privity of contract limits the management of contractual rights by the non-contracting spouse, article 2352 might be unnecessary.

54. See LA. CIV. CODE arts. 2801-2807 & 2812.

55. See LA. CIV. CODE arts. 2347, 2350, 2351, & 2353.

management of this corporation will be according to the articles of incorporation.⁵⁶ Likewise, if the husband and wife form a partnership, the partnership agreement will regulate the partnership.⁵⁷

Community enterprises may undertake such activities as ordering merchandise and supplies, borrowing money, and selling non-negotiable accounts receivable. If the community enterprise desires to sell or pledge nonnegotiable accounts receivable in an effort to avoid bankruptcy,⁵⁸ the ability of one spouse to sell the accounts depends on how the business is managed. If one spouse is the "sole manager" of the community enterprise or if the other spouse has renounced his right to concur in the management of the community enterprise, exclusive management applies and only the managing spouse may exercise control over the accounts.⁵⁹ However, joint management applies and consent of the other spouse is necessary if the transaction involves "all or substantially all" of the assets of the community enterprise.⁶⁰ If both the husband and wife participate in the management of the community enterprise, then equal management applies.⁶¹

Article 2353 renders the sale of the accounts to a third party voidable if the "nonmanaging" spouse exercises control or if consent of the other spouse is not secured when concurrence is required by law. Therefore, third parties dealing with a business owned by a husband and wife should exercise caution when they cannot easily "identify at least one spouse who unquestionably participates in management [of the community enterprise]." ⁶² Perhaps the articles regulating the management of the community enterprise should be amended to clarify the meaning of "sole manager." This phrase is presently undefined. An alternative solution is to amend the articles so that third parties may assume that the enterprise is subject to equal management unless one spouse has expressly renounced the

56. See LA. R.S. 12:24 (Supp. 1968).

57. See LA. CIV. CODE arts. 2801-2807.

58. See Tête, *A Critique of the Equal Management Act of 1978*, 39 LA. L. REV. 491, 523 (1979). See also LA. R.S. 9:3101(1) (Supp. 1952, 1964 & 1980).

59. LA. CIV. CODE arts. 2348 & 2350.

60. LA. CIV. CODE arts. 2347 & 2350. Consent is also required if movables are registered in the name of the nonmanaging spouse. LA. CIV. CODE art. 2351.

61. LA. CIV. CODE art. 2346. Although the articles do not state that both spouses have the right to manage the business, article 2348 implies that this right exists. Article 2348 allows either spouse to renounce the right to participate in the management of the community enterprise.

62. Bilbe, "Management" of the Community Assets Under Act 627, 39 LA. L. REV. 409, 424 (1979). Professor Bilbe states that the sole manager provision is "designed to discourage transactions with a spouse whose involvement in a business operation is questionable."

right to participate in the management. Under this arrangement third parties would not want to deal with only one spouse unless shown the express renunciation of the other spouse.

Personal Injury Claims

Because the portion of a spouse's personal injury claim which is community property is not included in any of the exceptions to equal management, the claim will be subject to equal management.⁶³ The community property portion consists of "damages attributable to expenses incurred by the community as a result of the injury, or in compensation of the loss of community earnings . . ."⁶⁴ The portion of the claim which is the injured spouse's separate property will not be managed by the community property management articles.⁶⁵

Because equal management applies to the community property portion of the tort claim, the uninjured spouse might have the right to sue to recover the community losses or to settle out of court with the tortfeasor or insurance company. Article 686 of the Louisiana Code of Civil Procedure allows the court to order joinder of the injured spouse at the trial if failure to do so would result in an "injustice" to that spouse, but no provision requires that the injured spouse be a party to a compromise agreement. If the wife is injured, the husband arguably can agree to a transaction or compromise with the tortfeasor's insurance company for his wife's medical expenses and loss of her earnings, including future wages.⁶⁶ This situation may occur if the injured spouse is in a coma or is reluctant to settle out of court. The insurance company probably will prefer to wait until the injured spouse has recovered and to settle the entire claim at once, but there will be no reason to delay if all or most of the claim is community property or if a limit exists on how much the insurance company will pay.

63. Article 686 of the Louisiana Code of Civil Procedure gives either spouse the authority to sue to enforce community rights:

Either spouse is the proper plaintiff, during the existence of the marital community, to sue to enforce a community right; however, if one spouse is the managing spouse with respect to the community right sought to be enforced, then that spouse is the proper plaintiff to bring an action to enforce the right.

When doubt exists whether the right sought to be enforced is a community right or is the separate right of the plaintiff spouse, that spouse may sue in the alternative to enforce the right.

When only one spouse sues to enforce a community right, the other spouse is a necessary party. Where the failure to join the other spouse may result in an injustice to that spouse, the trial court may order the joinder of that spouse on its own motion.

64. LA. CIV. CODE art. 2344.

65. See LA. CIV. CODE arts. 2344 & 2371.

66. See LA. CIV. CODE 3071-3083 for rules governing transactions or compromises.

If, after the uninjured spouse settles the injured spouse's claim for future wages, a petition is filed for separation of property, separation from bed and board, or divorce, then the loss of earnings that accrue after the termination of the community will be the injured spouse's separate property.⁶⁷ The money the uninjured spouse recovered for the injured spouse's future wages, which at the time of the settlement was considered community property, now arguably will be considered the separate property of the injured spouse.⁶⁸ In this situation the management articles have allowed the uninjured spouse to manage what later is determined to be the separate property of the injured spouse. The injured spouse might then have a claim for reimbursement.⁶⁹

Registered Incorporeal Movables

The Civil Code articles provide a structure for the management of incorporeal movables which are "issued or registered as provided by law." If the assets are registered in both names in the alternative ("Mr. or Mrs."), they are subject to equal management.⁷⁰

67. See LA. CIV. CODE art. 2344: "If the community regime is terminated otherwise than by the death of the injured spouse, the portion of the damages attributable to the loss of earnings that would have accrued after termination of the community property regime is the separate property of the injured spouse." In *Hall v. Hall*, 349 So. 2d 1349 (La. App. 4th Cir. 1977), the court held that "where the action for the husband's damages and the recovery of those damages occur during the existence of the marriage [prior to the divorce], the money recovered is community property . . ." *Id.* at 1352. Article 2344 of the new matrimonial regimes articles legislatively overrules this decision.

68. LA. CIV. CODE art. 2344.

69. See LA. CIV. CODE arts. 2358-2368. If the recovery money for future wages is later determined to be the wife's separate property (because of the judgment of separation or divorce), articles 2365 and 2367 allow the wife to recover one-half the amount, provided the husband used the money to satisfy a community obligation or to improve the community property. Reimbursement would come only from the community assets, not from the husband's separate property. However, article 2365 would allow recovery from the husband's separate property if the community obligation incurred was for ordinary or customary expenses of the marriage or for support, maintenance, or education of the children. Therefore, if the husband uses the recovery money for an expense that is not ordinary or that is for his separate property, no provision allows the wife to recover from his separate property when community funds are insufficient. In this case the wife might argue that the recovery money was actually community property and seek recovery under article 2366. See Note, *Termination of the Community*, 42 LA. L. REV. 789 (1982). The difficulty of applying the reimbursement articles to management of a personal injury claim by the uninjured spouse shows that the legislature did not contemplate equal management of the portion of the personal injury claim which is community property.

70. LA. CIV. CODE art. 2346. See generally LA. R.S. 10:3-116 (Supp. 1974).

Registered movables listed in the names of the spouses "jointly" ("Mr. and Mrs.") are governed by joint management.⁷¹ And those movables issued in only one spouse's name are under exclusive management.⁷²

An initial difficulty in utilizing article 2351 lies in determining just what "issued or registered as provided by law" means. For a movable to be managed by these provisions, article 2351 seems to require that some provision of law either refers to or requires the issuance or registration of the movable. Apparently these provisions do not apply in those situations when a spouse voluntarily registers a movable (e.g., registers a pedigreed dog) because no law "provides" for this registration. The comments to article 2351 list shares of stock, bank accounts, and negotiable instruments as examples of movables which must be registered.⁷³ Although "issued or registered as provided by law" is not defined, "it seems that the section [article 2351] was meant to encompass all movable assets for which there is specialized legislation concerning transfer or control."⁷⁴ This specialized legislation governing the registered movable will determine the validity of the actions of an unnamed spouse in managing a movable registered in the name of the other spouse.⁷⁵

If a negotiable instrument is payable to the order of one spouse, transfer of the note is accomplished by delivery with the necessary indorsement of the person in whose name it is issued.⁷⁶ Commercial laws do not give the unnamed spouse authority to negotiate a note payable to the order of the other spouse. A transferee who takes the instrument by negotiation, for value, in good faith, and without notice of any adverse claim to the instrument is a holder in due course and is protected against adverse claims which may arise.⁷⁷ But if the husband, by forging his wife's signature, attempts to negotiate a note issued or indorsed to the order of his wife, the

71. LA. CIV. CODE art. 2347.

72. LA. CIV. CODE art. 2351.

73. LA. CIV. CODE art. 2351, comment (a).

74. Bilbe, *supra* note 62, at 427.

75. Article 2353 declares that if concurrence is required by law, the alienation of community property by only one spouse is a relative nullity. The alienation of community enterprise assets by the nonmanaging spouse is also a relative nullity. Article 2353 does not apply to the unauthorized alienation of a movable registered in only one spouse's name. Thus, one must look to the laws governing the registered movable to determine the validity of the transaction. See text at notes 108-113, *infra*.

76. LA. R.S. 10:3-202 (Supp. 1974).

77. LA. R.S. 10:3-302 & 3-305 (Supp. 1974).

transferee of the note will not be a holder in due course,⁷⁸ and, therefore, will not be protected against the wife's claim.⁷⁹ For a husband validly to transfer a note payable to the order of his wife, he must have his wife's consent.⁸⁰

Banking laws require that accounts with banks, homestead associations, and savings and loan associations be registered in at least one person's name.⁸¹ Only the person in whose name the account is listed may withdraw funds from the account or otherwise exercise control over the account.⁸² If the spouses have a joint checking account listed in the alternative, the account is subject to equal management, and either spouse can write checks or withdraw money from the account. Equal management and the banking laws also allow a spouse to issue a stop order on a check written by the other spouse;⁸³ however, the contractual agreement between the bank and the spouses might provide that only the spouse who writes the check can issue a stop order on that check.

Life insurance policies are also issued in someone's name.⁸⁴ If the husband uses community funds to purchase an insurance policy on his life, only he will have the power to assign or pledge the policy, cancel the policy, exercise conversion rights, or name the beneficiary.⁸⁵ The wife cannot prevent her husband from changing the beneficiary, but the jurisprudence requires "strict compliance with the [insurance] policy requirements" to effect the change.⁸⁶ If retirement plans and annuities also are issued in someone's name, the named spouse (employee) will have the exclusive right to manage that interest.

78. *Id.*

79. See generally LA. R.S. 10:3-419 (Supp. 1974).

80. See LA. CIV. CODE art. 2985 and see text at notes 31-34, *supra*.

81. LA. R.S. 6:744 (Supp. 1970); LA. R.S. 10:4-104(e) (Supp. 1974). Numbered accounts are not allowed in Louisiana.

82. "Any subsequent transfer of the [homestead association] funds [by a third person without the written authorization of the person in whose name the account is registered] is null and without effect." *Doescher v. Marcotte*, 343 So. 2d 345, 348 (La. App. 4th Cir. 1977). See LA. R.S. 6:744 (Supp. 1970); LA. R.S. 6:766 (Supp. 1970 & 1977); LA. R.S. 6:806 (Supp. 1970); LA. R.S. 10:4-406 (Supp. 1974).

83. See generally LA. R.S. 10:4-403 (Supp. 1974); Hersbergen, *The Bank-Customer Relationship Under the Louisiana Commercial Laws*, 36 LA. L. REV. 29, 39 (1975).

84. LA. R.S. 22:624 (1950 & Supp. 1958).

85. LA. R.S. 22:637 (1950 & Supp. 1958); LA. R.S. 22:642 (1950 & Supp. 1958 & 1966). See *Berry v. Metropolitan Life Ins. Co.*, 327 So. 2d 521, 524 (La. App. 1st Cir. 1976), *writ denied*, 329 So. 2d 760 (La. 1976). See text at notes 35-44, *supra*.

86. *Morein v. North Am. Co. for Life & Health Ins.*, 271 So. 2d 308, 314 (La. App. 3d Cir. 1972), *writ denied*, 273 So. 2d 845 (La. 1973). See generally W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 123 (2d ed. 1971).

Allowing a spouse to have exclusive management over an incorporeal movable that is registered in his or her name poses a special problem for the nonworking spouse. Community assets subject to equal management can be converted into registered movables. The breadwinner, for example, can use the paycheck to purchase stocks and bonds, but the nonworking spouse may not have access to funds necessary to make such purchases. Equal management of money and other community assets does not guarantee equal access to these funds. Thus, "many of the most important forms of wealth will be subject to the exclusive management of one spouse [the breadwinner]." ⁸⁷

While the Code articles do not recognize the contributions of the nonworking spouse to the family,⁸⁸ Louisiana jurisprudence has recognized this contribution.⁸⁹ As a general policy concern, "[o]ne of the major considerations behind the community property system is to recognize and reward a wife's industry and labor (or the husband's, in the less frequent situation where the wife may be the principal breadwinner) which may only indirectly serve to enhance the community financially."⁹⁰ The articles concerning the management of registered movables perhaps should be amended to recognize and to reward the nonworking spouse for his contributions.

Several changes have been proposed which would recognize the contributions of the nonworking spouse. One suggested amendment is to allow the spouse in whose name the movable is not registered to secure joint registration if the court decides that failure to have joint registration will result in substantial injury to the unnamed spouse.⁹¹ A difficulty with this plan, however, is that the unnamed spouse who requests joint registration will then risk personal liability in a transaction involving the movable.⁹² For example, a third party

87. Bilbe, *supra* note 62, at 427. See Riley, *Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana*, 26 LOY. L. REV. 453, 496 (1980).

88. Riley, *supra* note 87, at 496-97.

89. See *West v. Ortego*, 325 So. 2d 242, 245 (La. 1975); *Succession of Wiener*, 203 La. 649, 666, 14 So. 2d 475, 480 (1943).

90. *West v. Ortego*, 325 So. 2d at 245.

91. Bartke, *The Reform of the Community Property System of Louisiana—A Response to its Critics*, 54 TUL. L. REV. 294, 332-33 (1980); Riley, *supra* note 87, at 500-01. But see Cross, *Community Property: A Comparison of the Systems in Washington and Louisiana*, 39 LA. L. REV. 479, 487 (1979). A provision which would have allowed the non-registered spouse to request joint registration was proposed but not passed by the Wisconsin legislature. Wis. Assembly Bill 1090 (introduced Dec. 5, 1979), quoted in Bartke, *supra*, at 333 n.216.

92. LA. CIV. CODE art. 2345. See Bilbe, *supra* note 62, at 418-22; Tête, *supra* note 58, at 509-15.

might issue a promissory note to the husband, and the wife might request joint registration. If the husband and wife transfer the note to another party and promise to pay the note if the maker is unable to, both the husband and wife risk personal liability if the maker does not pay. If community assets are insufficient to cover the obligation, the separate property of either spouse may be used to satisfy the obligation. Personal liability perhaps could be avoided if a spouse were to renounce expressly the right to concur in the transaction; but article 2348 would have to be amended to allow one spouse to renounce the right to concur in the alienation, encumbrance, or lease of a community movable registered in the names of both spouses.⁹³ "The renunciation, unlike the granting of a power of attorney or mandate, does not render the renouncing spouse a party to the transaction. Consequently, a resulting obligation may not be satisfied from the separate property of the spouse who renounces the right to concur."⁹⁴ Because the renouncing spouse may limit the renunciation to a stated term or to only one particular transaction, the benefits of joint registration are not avoided.⁹⁵

An additional problem with allowing the unnamed spouse to request joint registration is that the unnamed spouse later might be reluctant to agree to a transfer of the registered movable. As a result, commercial transactions involving community movables might be hampered. However, because joint registration would not be *required* but only *available* at the request of the unnamed spouse, and because joint registration would be limited to only those situations in which it was necessary to protect the interests of the unnamed spouse, the effect of joint registration on commerce will be limited. Additionally, in the event one spouse does not agree to the alienation of a movable registered in both names, the spouse who wants to transfer the movable could ask for judicial authorization to act without the other spouse's consent.⁹⁶

An alternative solution to the problems caused by exclusive management of registered movables is to consider the alienation, encumbrance, or lease of a registered movable by the spouse in whose name it is registered to be an act of "bad faith" unless the unnamed

93. See LA. CIV. CODE art. 2348. With commercial paper, the "renunciation" might appear on the instrument in the form of a qualified indorsement. See LA. R.S. 10:3-205, 3-206, & 3-304(5) (Supp. 1974).

94. LA. CIV. CODE art. 2348, comment (b). See generally LA. CIV. CODE arts. 2985 & 3021. For an area of the Civil Code which does not impose personal liability, see LA. CIV. CODE arts. 3295-3297.

95. LA. CIV. CODE art. 2348, comment (b).

96. LA. CIV. CODE art. 2355. See text at note 114, *infra*. The expense of involving the court might make this solution impractical.

spouse agreed to the transfer or at least knew about it.⁹⁷ This approach would allow the unnamed spouse to recover for any "loss or damage" caused by the named spouse's transfer of the registered movable.

Remedies for Mismanagement

Whenever one spouse can manage the community assets without the consent of the other spouse, the possibility of injury exists. The management articles provide three remedies to a spouse who has been injured by the other spouse's mismanagement of community property. These remedies are available during the marriage,⁹⁸ and apply to the mismanagement of incorporeal movables. Article 2354 provides that "[a] spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property."⁹⁹ Before the revision of the management articles, the wife could recover for fraud only.¹⁰⁰ In *Thigpen v. Thigpen*¹⁰¹ the court required the wife to prove two elements to recover for her husband's fraud: "(1) the sale of property conceived with the intent to reduce the wife's community interest, and (2) actual injury resulting therefrom."¹⁰² In *Thigpen* the court considered the following circumstances in deciding that the husband's sale of community property to his son was done with the intent to injure his wife: the husband remained in possession of the property and continued to exercise

97. Riley, *supra* note 87, at 500. See LA. CIV. CODE art. 2354, and see text at notes 99-107, *infra*.

98. Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code [articles 2325-2437]; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.

LA. R.S. 9:291 (Supp. 1960 & 1979).

99. LA. CIV. CODE art. 2354.

100. Before the revision of the matrimonial regimes provisions, article 2404 provided:

The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

....

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

LA. CIV. CODE art. 2404 (as it appeared prior to its repeal by 1979 La. Acts, No. 709).

101. 231 La. 206, 91 So. 2d 12 (1956).

102. 231 La. at 228, 91 So. 2d at 20. *Accord*, Hall v. Allred, 385 So. 2d 593, 597 (La. App. 3d Cir. 1980), writ denied, 393 So. 2d 735 (La. 1980).

control over it; the husband concealed the sale from his wife; at the time of the sale the husband and wife were not getting along and separation was inevitable; the property was sold five months before suit for separation from bed and board was filed; and the husband sold the property for less than it was worth.¹⁰³ Proving bad faith should not be as difficult as proving fraud.¹⁰⁴ Nevertheless, the standard for proving bad faith and fraud might be similar because article 2354 requires proof of actual injury ("loss or damage") for both fraud and bad faith. Presumably, the jurisprudence will develop the meaning of bad faith. A good faith spouse would consider the wishes of the other spouse and act in the best interest of the community.¹⁰⁵ If a spouse, by exercising the right of equal management over nonregistered movables, affects the "legal relations and responsibilities" of the other spouse, his actions might be deemed to be in bad faith, especially where the objections of the other spouse have been disregarded.¹⁰⁶ Bad faith, however, is not the same thing as bad judgment.¹⁰⁷ A spouse who takes a risk on the stock market may have exercised bad judgment, but she has not acted in bad faith.

Another remedy for mismanagement is found in article 2353:

When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur. Also, the alienation, encumbrance, or lease of the assets of a community enterprise by the non-manager spouse is a relative nullity.¹⁰⁸

Article 2353 provides no remedy for an act done in violation of the rules concerning the movables registered in only one spouse's name or partnership interests. One writer has stated that this "omission [in article 2353] does not signify legislative intent to make the management rules governing movables registered in one spouse's name or governing partnership interests effective only between the spouses."¹⁰⁹ Because the specific law of article 2353 does not cover

103. *Thigpen v. Thigpen*, 231 La. at 220-22, 91 So. 2d at 17. See also *Pitre v. Pitre*, 247 La. 594, 611, 172 So. 2d 693, 699 (1965) (the husband did not make a full disclosure to his wife of all pertinent information); *Hodson v. Hodson*, 292 So. 2d 831, 837 (La. App. 2d Cir. 1974) (the husband altered and destroyed records).

104. See *Riley*, *supra* note 87, at 499.

105. *Id.*

106. See text at notes 35-46, *supra*.

107. See generally *Cross, Equality for Spouses in Washington Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527, 542 (1973).

108. LA. CIV. CODE art. 2353.

109. *Spaht*, *supra* note 10, at 119-20. The 1978 revision provided that any act "made by one spouse without the right to do so is voidable at the instance of the other spouse." 1978 La. Acts, No. 627, § 1 (repealed 1979).

registered movables or partnership interests, the general law must be consulted to determine whether the transaction is valid or null.¹¹⁰ But the laws governing registered movables do not always provide an answer.¹¹¹ Article 2353 perhaps should be amended to include registered movables and partnership interests;¹¹² however, such an amendment should be consistent with the laws which protect good faith purchasers. Another possibility is to consider an unnamed spouse's sale of a movable registered in the other spouse's name to be an act of bad faith. The spouse in whose name the movable was registered could then recover from the other spouse for any loss or damage.¹¹³

A third remedy provided by the management articles is contained in Civil Code article 2355. This article allows a spouse to seek judicial authorization to act without the other spouse's consent; it applies only to those situations where concurrence is required. The spouse seeking judicial authorization must prove that the "action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse."¹¹⁴

In addition to the remedies provided in the management articles, the spouses may seek a judicial separation of the property.¹¹⁵ An aggrieved spouse might also have an action in declaration of simulation if the other spouse purports to sell community property to a third person but remains in possession of the property.¹¹⁶ Additional relief might be provided upon termination of the community property regime if a spouse has a claim for reimbursement from the other spouse.¹¹⁷

Conclusion

While the new matrimonial regimes articles address many of the problems involved in the management of incorporeal movables, some difficulties remain. Uncertainty exists in the definitions of "issued or registered as provided by law," "sole manager," and "bad faith."

110. See Spaht, *supra* note 10, at 120.

111. See text at notes 76-86, *supra*.

112. See Riley, *supra* note 87, at 503-04; Spaht, *supra* note 10, at 121.

113. See text at notes 99-107, *supra*.

114. LA. CIV. CODE art. 2355.

115. LA. CIV. CODE arts. 2336, 2370, 2374 & 2375. Article 2336 was amended in 1981 to make it clear that the spouses may voluntarily partition the community property in whole or in part during the existence of the regime. 1981 La. Acts, No. 921, § 1.

116. LA. CIV. CODE art. 2480.

117. LA. CIV. CODE arts. 2358-2368. See Spaht, *supra* note 10, at 141-42; Note, *supra* note 69, at 799-806.

Another problem is that no remedy for the management of partnership interests or registered movables by the unauthorized spouse was included in the 1979 revision. Potential problems are also present in the management of personal injury claims, community enterprises, and contractual rights. Finally, the provision allowing exclusive management of movables registered in only one spouse's name should be amended to permit the unnamed spouse to request joint registration. In short, revision of the legislation is needed to clarify ambiguities and to provide for the management of those incorporeal movables which are not specifically regulated by the management articles.

Janis Lynn Kile